

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

iRACING.COM MOTORSPORT
SIMULATIONS, LLC
a Delaware Limited Liability Company,
Plaintiff, Civil Action
V. No. 05-11639-NG
February 5, 2009
TIM ROBINSON individually,
doing business as
www.First-Racing-Sucks.com
doing business as
www.ow-racing.com
doing business as
www.torn8alley.com,
Defendant.

TRANSCRIPT OF BENCH TRIAL DAY 1
TESTIMONY OF TIM McARTHUR AND TIM ROBINSON
BEFORE THE HONORABLE REGINALD C. LINDSAY
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
1 COURTHOUSE WAY
BOSTON, MA 02210

DEBRA M. JOYCE, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
1 Courthouse Way, Room 5204
Boston, MA 02210
617-737-4410

1 APPEARANCES:

2

3 FOR THE PLAINTIFF:

4 IRWIN B. SCHWARTZ, ESQ.

5 MICHAEL G. ANDREWS, ESQ.

6 NICHOLAS R. CASSIE, ESQ.

7 Business Litigation Associates, P.C.

8 Suite 1860

9 500 Boylston St.

10 Boston, MA 02116

11 617-421-1800

12

13 FOR THE DEFENDANT:

14 JOSEPH F. RYAN, ESQ.

15 Lyne, Woodworth & Evarts LLP

16 12 Post Office Square

17 Boston, MA 02109

18 617-523-6655

19

20

21

22

23

24

25

1 P R O C E E D I N G S

2 (The following proceedings were held in open
3 court before the Honorable Nancy Gertner, United States
4 District Judge, United States District Court, District
5 of Massachusetts, at the John J. Moakley United States
6 Courthouse, 1 Courthouse Way, Boston, Massachusetts, on
7 February 5, 2009.)

8 * * * * *

9 TIM McARTHUR, having been duly sworn by the
10 Clerk, was examined and testified as follows:

11 LAW CLERK: You can be seated, please.

12 THE COURT: So his affidavit would come in as
13 the direct examination in as far as it deals with the no
14 CD patch.

15 You want to, then, proceed to cross-examination.

16 MR. SCHWARTZ: Thank you.

17 THE COURT: And that would be paragraph 25.

18 CROSS-EXAMINATION

19 BY MR. SCHWARTZ:

20 Q. Mr. McArthur, did you download any of the
21 executables that are at issue in this case?

22 A. No.

23 Q. At the time?

24 A. No.

25 Q. And did you download the NO-CD patch from

1 Mr. Robinson at the time?

2 A. I didn't need to.

3 Q. But the answer is, no, you didn't?

4 A. I did not; I downloaded it elsewhere.

5 Q. You downloaded -- the precise customized NO-CD patch
6 that Mr. Robinson has testified was customized for his
7 open-wheel racing product?

8 A. There were probably hundreds of NO-CD patches. I'm
9 not sure which precisely was his, I never downloaded the
10 illegal versions.

11 Q. So you have no personal knowledge at all about the
12 precise product that Mr. Robinson distributed?

13 A. No, just hundreds of others.

14 Q. Okay. In your experience generally with NO-CD
15 patches, as they apply -- do you have experience with
16 those CD patches as they apply to NASCAR 2003?

17 A. I do. I used to release them.

18 Q. Okay. And the NO-CD patch for NASCAR 2003 requires
19 that a copy of NASCAR 2003 be installed on the computer
20 as a predicate to it working; isn't that right?

21 A. You had to have a valid installation of NASCAR 2003.

22 Q. Right. And by the word "valid," what do you mean?

23 A. Well, you had to have the CD purchased from the
24 store, installed just like any other user would.

25 Q. Right. So if I purchased one from the store and

1 installed it and then installed your NO-CD patch that
2 you were distributing and then I took it to my
3 girlfriend's house, for example -- assuming I had a
4 girlfriend at the time -- and took that NASCAR 2003,
5 installed it in her computer and then ran the NO-CD
6 patch in that computer, could I run both those games at
7 the same time?

8 A. In a single-player format?

9 Q. In any format?

10 A. In all formats, absolutely not. I am not familiar
11 with the single-player modes of NASCAR 2003. I do think
12 it was possible to be able to do that, yes.

13 Q. Okay. So, in fact, the NO-CD patch, as this Court
14 has already found, did allow someone to provide multiple
15 copies of the same disk, the same software program on
16 one license?

17 A. I'm sorry. Can you rephrase that?

18 Q. In other words, someone could buy one license from
19 Vivendi, install the NASCAR 2003 on one computer,
20 install the NO-CD patch on that computer, and then turn
21 around and install the same software on another computer
22 and play them both using one license. It's possible?

23 A. Sure, sure, anything is possible. You can download
24 the entire NASCAR 2003 off a ware site and not have a CD
25 at all.

1 Q. Now, let's just make sure we're talking about the
2 same thing. When you say a "ware site", you're talking
3 about --

4 A. Like a piracy site.

5 Q. -- a site that supports piracy?

6 A. Yes.

7 Q. Did you engage in any testing of Mr. Robinson's
8 executables prior to coming here to testify?

9 A. No.

10 Q. Okay. So as you sit here today, you don't know
11 whether someone using Mr. Robinson's executables and
12 Mr. Robinson's NO-CD patch could, in fact, participate
13 in a race with somebody else using the same NASCAR 2003
14 license?

15 A. I'm sorry, you're going to need to ask that again.

16 Q. So assuming the executables that are at issue in
17 this case, there's an open-wheel executable and there's
18 a sprint car executable, do you know for a fact that
19 someone using the NO-CD patch that he was distributing,
20 whether they could install his executables on two
21 different computers and race each other?

22 A. Yeah, I would imagine they could have raced each
23 other, yes.

24 Q. Okay.

25 A. Two people with valid --

1 Q. I beg your pardon?

2 A. Two people with valid installations or invalid?

3 Q. Two people with only having bought one NASCAR 2003
4 disk.

5 A. Yeah, I believe they still could.

6 Q. Okay.

7 Now, you, I think, as Mr. Ryan has foreshadowed,
8 you were distributing an application that modified the
9 NASCAR 2003 executable, were you not?

10 A. In early 2004, yes.

11 Q. And First-Racing at the time, now known as iRacing,
12 sued you to stop you from doing it?

13 A. They attempted to.

14 Q. They did sue you, didn't they?

15 A. I don't remember ever appearing in court, no.

16 Q. Were you served with a complaint?

17 A. I was served with a complaint.

18 Q. Did you stipulate to the entry of a permanent
19 injunction entered by the District Court in the District
20 of Massachusetts?

21 A. For me to no longer take part in any editing actions
22 in NASCAR 2003.

23 Q. Are you telling this Judge that you don't know
24 whether you got sued?

25 A. To me, I'm sorry, there's a difference between a

1 lawsuit that I never showed up in court and I do. No,
2 would I still do not consider that as being sued, I'm
3 sorry.

4 Q. Now, did you resent iRacing for having sued you for
5 distributing that executable?

6 A. Oh, I'm sure. Yes. If somebody comes after you for
7 something that they had given you permission for years
8 to do, would you not resent them?

9 Q. Well, fortunately, my point of view is not an issue
10 in this case.

11 Do you blame John Henry?

12 A. Do I blame John Henry?

13 Q. For you having been sued by iRacing?

14 A. No, I don't necessarily blame John Henry
15 particularly.

16 Q. How much did iRacing pay you to settle that case?

17 A. I can't discuss settlement of the case.

18 Q. You can.

19 A. Can I?

20 Q. Yes. How much did iRacing pay you to settle that
21 case?

22 A. They didn't pay me a dime.

23 Q. They didn't pay you a dime?

24 A. Not a dime. They just took care of all the attorney
25 work.

1 Q. Okay. So let me direct your attention to
2 Mr. Robinson's affidavit. The direct testimony of
3 Mr. Robinson -- I know you don't have it in front of
4 you, so I'm going to read to you something from --

5 THE COURT: You can put it on the document
6 camera and it will appear on his screen.

7 MR. SCHWARTZ: Oh, the document camera.

8 (Discussion off the record.)

9 MR. SCHWARTZ: Your Honor, if you give me a
10 minute, I just need to find the particular --

11 (Discussion off the record.)

12 MR. SCHWARTZ: Okay. Your Honor, I have placed
13 in front of the witness page 13 of Mr. Robinson's trial
14 affidavit.

15 BY MR. SCHWARTZ:

16 Q. And in particular, if you look at the highlighted
17 text, which is at the end of paragraph 34, it says, "It
18 is my understanding that an out-of-court settlement was
19 reached between the parties" -- referring to the lawsuit
20 against Tim Robinson -- "with first paying a sum of
21 money to purchase Mr. McArthur's files."

22 Do you see that, Mr. McArthur?

23 A. I can see that on the screen, yes.

24 Q. Did First-Racing pay a sum of money to purchase your
25 files?

1 A. I answered they did not.

2 Q. You turned them over as part of the settlement,
3 didn't you?

4 A. That's correct.

5 Q. And did you ever talk with Mr. Robinson about this
6 fact?

7 A. I, in fact, haven't talked to Mr. Robinson since
8 early 2005.

9 Q. So Mr. Robinson is just plain wrong when he says
10 that in his affidavit?

11 A. Obviously, yes.

12 Q. Okay.

13 MR. SCHWARTZ: Your Honor, may I hand the
14 witness an e-mail that was just produced to us under
15 your Honor's order compelling production? We got it, I
16 believe, it was yesterday.

17 Q. Mr. McArthur, do you recognize this document?

18 A. I do.

19 Q. This is an e-mail that you sent to Joe Ryan; is that
20 right?

21 A. Correct.

22 MR. RYAN: I object, your Honor. This is no
23 relation to this NO-CD issue that he's supposedly --

24 THE COURT: It's regular garden variety
25 impeachment.

1 MR. SCHWARTZ: Based on bias, especially, your
2 Honor.

3 THE COURT: All right. You can have it.

4 MR. SCHWARTZ: Thank you.

5 BY MR. SCHWARTZ:

6 Q. What are you referring to in the term "gloating,"
7 sir?

8 A. I was using your term. That's the reason it's in
9 quotes.

10 Q. My term?

11 A. Yes. From my understanding, it was -- I'm sorry,
12 iRacing's term, that I was gloating about a settlement.

13 Q. And you say that was your intention, to have them to
14 be not happy with your gloating; is that right?

15 A. I guess by me discussing things that you didn't
16 like, yeah, I guess it would be my intention that it
17 made you unhappy.

18 Q. So you were trying to antagonize iRacing; isn't that
19 what you're saying here, sir?

20 A. No.

21 MR. SCHWARTZ: No further questions, your Honor.

22 THE COURT: Anything?

23 MR. RYAN: No questions, your Honor.

24 THE COURT: Thank you very much.

25 MR. SCHWARTZ: Have a nice flight home.

1 THE WITNESS: I'm sorry?

2 MR. SCHWARTZ: I said have a nice flight home.

3 THE WITNESS: You, too.

4 (Recess taken.)

5 THE COURT: So, finally, Mr. Ryan, Mr. Robinson.

6 TIM ROBINSON, having been duly sworn by the
7 Clerk, was examined and testified as follows:

11 THE COURT: Go on, counsel.

12 MR. SCHWARTZ: Thank you.

13 | CROSS-EXAMINATION

14 BY MR. SCHWARTZ:

15 Q. Good afternoon, Mr. Robinson.

16 A. Good afternoon.

17 | Q. Did you ever talk to John Henry?

18 A. No.

19 Q. No. So you never received a, quote, invitation from
20 John Henry to modify the NASCAR 2003 code?

21 A. No.

22 Q. No. What about Steve Myers, did he ever give an
23 invitation to modify the NASCAR 2003 code?

24 A. Personally?

25 Q. Yes.

1 A. No.

2 Q. Did you talk to anyone at Project Wildfire, actually
3 talk to them or e-mail them, where they said, Go ahead,
4 modify the NASCAR 2003 code?

5 A. I never talked to anybody personally at Project
6 Wildfire, no.

7 Q. Okay. What about Sierra? Anybody at Sierra give
8 you permission to modify the NASCAR 2003 code?

9 A. No.

10 Q. Anybody from First-Racing or iRacing give you
11 permission to modify the NASCAR 2003 code?

12 A. No.

13 Q. Now, according to your affidavit, you were on
14 vacation in Montana, right, and you came back and you
15 were served with a complaint?

16 A. That's correct.

17 Q. How long between when you were served a complaint
18 and when you took the links that -- for the downloads,
19 you disabled those links?

20 A. I think within a day or so.

21 Q. Okay. If you hadn't been served with a complaint,
22 would you have taken them down?

23 A. If I would have discovered that they were up, yes.

24 Q. Okay. So your testimony is that you didn't know
25 that they were up; is that right?

1 A. That's correct.

2 Q. I'm going to show you on the document viewer that
3 I've learned how to use today paragraph 39.

4 THE COURT: All of this fancy high-tech stuff
5 and the document camera is the challenge?

6 MR. ANDREWS: That's what I've been trying to
7 tell him, your Honor.

8 MR. SCHWARTZ: Your Honor, one of the things
9 I've learned is that technology is my enemy when it
10 comes to being in a courtroom, because it never seems to
11 work the way I want it to work, especially in trial.

12 (Discussion off the record.)

13 BY MR. SCHWARTZ:

14 Q. In paragraph 40, actually, you see you say,
15 "Although I own the websites" -- now we're talking
16 about, what, torn8oalley and ow-racing.com? What
17 websites are you talking about in that paragraph of your
18 affidavit, sir?

19 A. Excuse me?

20 Q. You see where it says, "Although I own the
21 websites"?

22 A. Yes.

23 Q. What websites are you referring to?

24 A. I believe I'm referring to torn8oalley.com and
25 ow-racing.com.

1 Q. And then you say, "Because the sites host races, in
2 my absence, other people have to be able to have access
3 to the sites."

4 A. That would be a reference to torn8oalley.

5 Q. You say, "It was a mistake by a part-time
6 administrator while I was away on vacation that led to
7 the re-posting of the link."

8 First off, what link are you referring to there?

9 A. A link to download either the owr2K5 or the NO-CD
10 patch, I assume.

11 Q. You don't know what link you're referring to there?

12 A. Well, this -- when I did this up, it was in
13 reference to a document that you provided, so I sort of
14 went chronologically through that document. So some
15 document that you submitted I think I was answering to
16 that. So based on what I see there and what I recall,
17 I'm quite confident that it's related to ow-racing
18 and/or torn8oalley.com.

19 Q. And was there one link or more than one link
20 involved in the download process of the two files that
21 are at issue in this case?

22 A. There was two links.

23 Q. Okay. So your testimony is that is a typo and
24 should have said "links"?

25 A. Semantics, if you will.

1 Q. All right.

2 Who is the part-time administrator that you're
3 referring to there?

4 A. At that time it was one of two people. Could have
5 been somebody named Rob Peterson or somebody named Joe
6 Barlow.

7 Q. Okay. Now, I just want to make sure I understood
8 your previous testimony correctly. Are you saying
9 Peterson or Barlow had access to the torn8alley website
10 but not the ow-racing website?

11 A. No.

12 Q. I thought you just said -- the sentence that says
13 the site hosts races, in my absence, other people have
14 to be able to have access to the sites. You said that
15 referred to one site. Did I misunderstand that?

16 A. Yes, you did.

17 Q. Okay. That's both sites?

18 A. Yes.

19 Q. Okay. Is it your position that one of those two
20 gentlemen reactivated the link which you had previously
21 taken down?

22 A. That's my guess. I don't know for sure because,
23 like I say, I was on vacation, so I don't know exactly
24 which one of those two may have done it. I don't know
25 that that they, in fact, did it. All I know is they had

1 access to the site during that time, and intuitively, it
2 would have been one or the other of those two guys.

3 Q. So when you say affirmatively that it was a mistake
4 by a part-time administrator, you're just guessing
5 that's what happened?

6 A. No, I know it was a mistake, because I had created
7 the actual html file, as it were, to -- that contained
8 those links to them, but I had taken them down.

9 Q. Okay. Now, you also, by the way, acknowledge that
10 at that same point of the link there was a pop-up or a
11 rollover that said, "bite me first"?

12 A. Yes.

13 Q. And who created the "bite me first," sir?

14 A. I did.

15 Q. Okay. So your testimony is you created "bite me
16 first," and "bit me twice," I think, was the other one;
17 is that right?

18 A. I don't recall what it said, but it was something
19 along those lines, yes.

20 Q. And that was placed on the web page in the vicinity
21 of where the links ultimately were activated to download
22 the software, right?

23 A. Say that again?

24 Q. The graphic that popped up, "bite me first" and the
25 graphic that popped up "bit me twice first," were in the

1 vicinity on the web page where the ultimately activated
2 link caused the download; is that right?

3 A. I don't actually recall.

4 Q. Well, you're not claiming that the "bite me first"
5 or the "bite me twice first" -- that wasn't a mistake,
6 was it?

7 A. No, I created those.

8 Q. Okay.

9 You recall, sir, early in this case that we
10 served interrogatories --

11 MR. SCHWARTZ: May I approach the witness, your
12 Honor?

13 THE COURT: Yes, you may.

14 BY MR. SCHWARTZ:

15 Q. -- on your counsel. And in particular, if you take
16 your attention to interrogatory number 7, which is on
17 page 3 of what -- page 2, I'm sorry, of what I just
18 handed to you; is that right?

19 A. Excuse me?

20 Q. Is interrogatory 7 on page 2 of what I just handed
21 you? I gave you a different version than what I have.

22 Do you have interrogatory 7 in front of you?

23 A. Yes.

24 Q. You see the question there: "For each website you
25 identified in response to interrogatory number 6" -- and

1 that would be the websites to which you downloaded these
2 two files -- "identify all persons who contributed or
3 have contributed to its content or existing" -- "content
4 or existence, including but not limited to owners,
5 administrators, and contributing members. For each such
6 person, identify his or her particular roles," so forth
7 so on?

8 You see your answer: "I am solely responsible
9 for the existence of the two previously mentioned
10 websites. I am also solely responsible for downloadable
11 content. Registered members also contribute to the
12 content."

13 THE COURT: Where are you reading from?

14 MR. SCHWARTZ: I'm reading from the answer to
15 interrogatory 7.

16 THE COURT: I see.

17 BY MR. SCHWARTZ:

18 Q. And then you give a list.

19 You say, "In addition to torn8oalley, there's
20 one discussion forum administrator named TMan66, but he
21 only has access to discussion forums and FAQ portion."

22 And then you say, "As it relates to
23 ow-racing.com, there are two administrators" -- I'm
24 sorry -- "there are three administrators MaxTone,
25 TMann66 and JoeB." But again, only for discussion forum

1 administrative privileges.

2 We go on, sir, the links that were on the
3 ow-racing.com website, those weren't in the discussion
4 forum, were they?

5 A. Say that again? Sorry.

6 Q. The links that are the issue in this case, by which
7 people could download a modified -- or at least an
8 application that allowed people to modify NASCAR 2003,
9 those were not in the discussion forum?

10 A. If you're saying that the front page images that you
11 referred to previously, then, yes, that's a true
12 statement.

13 Q. Well, isn't it true, sir, regardless of who
14 activated the links, that the links by which users were
15 able to download the files that you created that
16 modified NASCAR 2003, those active links were on the
17 first page, not the discussion forum page, of [open-wheel racing](http://open-wheel-racing)?

18 A. When this came about, that's correct.

19 Q. Right. So -- okay.

20 And likewise, on torn8oalley -- were there links
21 posted on torn8oalley, by the way, to download these two
22 files?

23 A. I don't believe so.

24 Q. Okay. Look at your interrogatory number 8.

1 "Identify all persons who are wholly or particularly" --
2 "partially responsible for posting NASCAR 2003
3 modifications for download on any of the websites."

4 Answer: "I am solely responsible for the
5 downloadable content of the two previously mentioned
6 websites."

7 A. Correct.

8 Q. That's your answer, right?

9 A. Yes.

10 Q. You don't mention anybody else who might have had
11 partial responsibility while you were on vacation, do
12 you?

13 A. No. I said I am solely responsible for the
14 downloadable content.

15 Q. Right.

16 A. So I am solely responsible for the downloadable
17 content.

18 Q. And that includes the files that are at issue in
19 this case, right?

20 A. Yes.

21 Q. Okay.

22 I'm going to give you, sir, with the Court's
23 permission, excerpts from your deposition transcript.

24 MR. SCHWARTZ: These are already in the record,
25 your Honor.

1 THE COURT: These are separately marked as an
2 exhibit?

3 MR. SCHWARTZ: We submitted, your Honor,
4 excerpts from Mr. Robinson's deposition, as was required
5 by the Court's scheduling order. We are relying on them
6 as evidence as permitted under, what is it, Rule
7 36(a)(3).

8 THE COURT: I got it, as an admission statement.

9 MR. SCHWARTZ: So this cross-examination is in
10 addition to his admissions in his deposition transcript,
11 excerpts of which we filed through the ECF system on the
12 date they were due.

13 BY MR. SCHWARTZ:

14 Q. Now, I ask you, sir, if you go to page 77 --

15 A. What page, I'm sorry?

16 Q. Page 77 of your deposition transcript.

17 A. Okay.

18 Q. And I ask you on line 21: "Was there anybody else
19 who assisted you in making the modifications to the
20 open-wheel racing 2005 product?"

21 And you say, "No."

22 Do you see that?

23 A. Yes.

24 Q. And then the next question, I ask you about whether
25 there was a mistake in -- as you testified here today,

1 that these files were made available for public
2 download?

3 And you say, "That's right."

4 Now, would you please read for the record lines
5 6 through 14 of page 78?

6 A. Read lines 6 --

7 Q. You know what, we'll move this along.

8 MR. SCHWARTZ: Your Honor, I incorporate into
9 the record lines 6 through 14.

10 Now, look at line 22, please.

11 "Okay. Does anyone other than you have the
12 ability to modify the ow-racing.com site such as placing
13 links on it?

14 You say, "Currently?"

15 And I say, "No, at the time these links were
16 made live in August 2005?"

17 And you say, "I don't know. There wasn't
18 supposed to be anybody else but" --

19 And then I ask you, "Don't you need to have some
20 kind of access code to be able to make those types of
21 modifications?"

22 And your answer: "Well, you need to be able to
23 do so."

24 And you say -- and looking at line 13 through
25 15 -- No, I don't have any recollection or any e-mails

1 or anything suggesting you gave access to anyone.

2 Now, sir, when you were saying "gave access to
3 anyone," weren't you responding to myself when I was
4 saying, Who could have made those links live?

5 A. To be quite honest with you, I don't recall the
6 context in which -- when you did the deposition, you
7 jumped all over the place so often that it was hard for
8 me to really keep up with what you were doing.

9 What I do know is that there were a couple of
10 individuals that had access to the ow-racing site. At
11 the time when we took this deposition, I don't recall
12 giving them specific access to do anything on the front
13 page or anything like that, but, apparently, I did. I
14 mean, that's the only way that that could have happened.

15 So in -- when I was leaving for vacation to go
16 to Montana, I probably overlooked something that gave
17 them more access than what I thought I was giving them
18 is really my only explanation as to why they would have
19 had the ability to make those links come back available
20 when they had been offline for, you know, four, five
21 months.

22 Q. Now, you recall, sir, don't you, that you have
23 submitted a number of affidavits in this case before
24 this trial affidavit that we've just been looking at?

25 A. I've submitted a lot of things.

1 Q. That's right. And would you agree with me that in
2 no affidavit prior to the trial affidavit that you just
3 submitted this last week you ever identified a part-time
4 administrator as being responsible for making those
5 links live?

6 A. I may not have called anybody a part-time
7 administrator, but right on this back page -- one of
8 these pages we were just talking about I think we said
9 it was a mistake that it got put on there. You asked
10 me, Does to anybody else have the ability to modify
11 ow-racing? And I asked you, Currently? You asked, At
12 the time. You know.

13 Q. But I'm asking you a question, sir, which is, before
14 your trial affidavit in this case, had you identified
15 anybody who had the ability to make those links live
16 until you just said in your trial affidavit that it was
17 some part-time administrator?

18 A. Well, we talked earlier about these three
19 individuals mentioned here in -- somewhere, wherever you
20 were looking at.

21 Q. I think you're referring to your response to
22 interrogatory number 7, but don't you agree with me,
23 sir, that as to those, it was just access to the
24 discussion forum and the FAQ section?

25 (Pause.)

1 A. I think you're trying to narrow it just a little bit
2 more than what really was there just by the way these
3 websites are constructed. So giving somebody an
4 administrative privilege, if not done correctly, could
5 give them more access than what I may have intended. So
6 to say -- to say what you're saying there, you know, I
7 don't really know.

8 Q. Okay. Are there any documents in your possession,
9 sir, that would reflect that it was actually another
10 person who made those links live other than yourself?

11 A. Say that again?

12 Q. Do you have any documents, any proof that you
13 authorized them by mistake or any type of digital record
14 or paper record that would support your position here
15 today that it was somebody other than you that made
16 those links live?

17 A. No.

18 Q. What makes you think that Tim McArthur was paid to
19 set up -- by First-Racing for purchase of his files?

20 A. That was an assumption that I made based on my
21 analysis, as it were, of things that had been said and
22 done in the sim racing community subsequent to his
23 settlement, I guess, if that's what you want to call it.

24 Q. So it was some kind -- you were basing it on some
25 kind of folklore?

1 A. No, to characterize it as folklore is ridiculous.

2 Q. Well, I want to know, what was the basis? You made
3 a representation under oath to this Court that Tim
4 McArthur was paid for his files. There's got to be a
5 basis for that.

6 MR. RYAN: Objection.

7 A. That was my opinion.

8 Q. And based on what?

9 A. Based on an assumption I had. Clearly, I didn't
10 have any inside knowledge of Tim McArthur being paid. I
11 just made an assumption. Usually when somebody talks
12 about a settlement, you know, I interpret sometimes to
13 mean there's a payment paid.

14 Whether or not there was a payment made, I don't
15 know; I don't care. I assumed there was. If there
16 wasn't, I was wrong.

17 Q. Anything else in here that you assumed on a
18 similarly weak basis?

19 A. I don't know. Do you want to go into some of it?

20 Q. No, I'm asking, you, sir. You put this in an
21 affidavit to this Court --

22 THE COURT: I think I've heard enough.

23 MR. SCHWARTZ: Thank you.

24 BY MR. SCHWARTZ:

25 Q. Have you ever used race2play.com?

1 A. Yes.

2 Q. And are you a subscriber to race2play.com?

3 A. Currently I think I'm considered a guest.

4 Q. Okay. Would you tell the Court what race2play.com
5 is?

6 A. It is an online gathering place that people race sim
7 racing games.

8 Q. Okay. So is NASCAR 2003 on race2play.com?

9 A. Currently, I don't believe so.

10 Q. Okay. Let's assume with me for a moment that your
11 mod was never shut down by the Court or by your
12 agreement to take it down. Let's assume it was
13 available from 2005 to the present. Is there anything
14 that would have prevented your mod from being available
15 to play on race2play.com?

16 A. That would be up to the people that run race2play,
17 not me.

18 Q. Right. But they could have, correct?

19 A. I suppose.

20 Q. Right. So just so I can complete the picture, I
21 hope, in the Judge's mind, on race2play.com, tell me
22 what happens. What goes on on that website?

23 A. I just told you, people gather there to race online
24 games, much like they do at iRacing, the difference
25 being that iRacing is a web-based sort of deal, as I

1 understand it. Race2play you have to own the software
2 that they're hosting a race for to be part of that
3 particular race.

4 Q. Do you know who owns race2play.com?

5 A. Yes.

6 Q. Who does?

7 A. Tim McArthur, and he has a partner.

8 Q. Okay.

9 Now, let me just make sure I understand how it
10 was that the applications that were available for
11 download for that short period of time from your
12 website, how they actually worked. I think you've
13 already testified that you needed to own a copy of
14 NASCAR 2003, you, the end user, the person who downloads
15 it, in order for your application to work at all; is
16 that right?

17 A. That's correct.

18 Q. And if someone downloaded your application and then
19 ran it, what happened?

20 A. Which application?

21 Q. Let's take, for example, the open-wheel racing --
22 let me just get the actual name of it, the owr2k5 file.

23 A. Okay.

24 Q. They download that file from your website and run
25 it. What happens?

1 A. You clearly demonstrated that during the deposition,
2 that -- because you did it or you had it or something,
3 and you downloaded, double clicked on it, installed it,
4 and it didn't work.

5 Q. Right. Are you saying that your open racing 2K file
6 didn't work?

7 A. No. You asked a question, what would happen if you
8 downloaded that file and double clicked on it after it
9 was installed. It wouldn't work.

10 Q. What was supposed to happen?

11 A. What's supposed to happen is it gets installed
12 correctly into your NASCAR 2003 folder, directory,
13 whatever you want to call it, and then, and only then,
14 would the game work with owr2k5 that worked.

15 Q. And what did it do when it worked?

16 A. It allowed you to have an open-wheel racing
17 experience in an Indy-style race car.

18 Q. And did it copy the NASCAR 2003 executable that was
19 residing on the end-user's computer?

20 A. No.

21 Q. Did it edit or modify that executable?

22 A. No.

23 Q. Then how did it create the experience that you've
24 just described?

25 A. The executable was part of the install package that

1 somebody would ultimately install in their machine.

2 Q. So you distributed an executable file that was
3 modified already for NASCAR 2003; is that right?

4 A. Yes.

5 Q. Okay. And there was no operation of the open-wheel
6 racing or the owr2k5 file that did anything to the
7 existing file, the existing NASCAR 2003 file?

8 A. Which existing file?

9 Q. The one that the end user would have had on their
10 system already when they downloaded your file.

11 A. There's hundreds of files that are part of 2003.
12 Which file are you referring to?

13 Q. Did it modify any of them?

14 A. I honestly don't specifically recall if we actually
15 modified any files that were already there. Most of
16 what we included, as I recall, was new content, as it
17 were, to go along with the open-wheel experience, if
18 that's what you want to call it.

19 Q. So -- I'm sorry. What I'm trying to get at is when
20 someone was trying to run your open-wheel experience,
21 were they running the NASCAR 2003 software that they had
22 already installed or were they running some entirely new
23 software that you had distributed to them through the
24 download link?

25 A. They're running both. I mean, because we made use

1 of some of the existing components that were in NASCAR
2 2003, and we obviously had new components.

3 Q. Okay.

4 Let me direct you to Exhibit C, which should be
5 in the binder in front of you.

6 A. Excuse me?

7 Q. Exhibit C.

8 A. B or C?

9 Q. C as in Charlie, please.

10 A. Okay.

11 Q. Just want to confirm, is this Exhibit C an e-mail,
12 at least the bulk of it, that you sent to Steve Myers in
13 around March 4, 2005?

14 A. It appears to be, yes.

15 Q. Okay. And when you say, It does and will use highly
16 modified NR2000 physics, what do you mean by that? I'm
17 looking at the fifth paragraph.

18 A. Looking at what?

19 Q. The fifth paragraph. "It does and will use highly
20 modified NR2003 physics." Do you see that?

21 A. Yes.

22 Q. What do you mean by that?

23 A. Exactly what it says.

24 Q. Okay. Does that mean you're modifying the
25 executable, NASCAR 2003 executable?

1 A. Yes.

2 Q. Okay. And you don't claim, do you, that you somehow
3 needed to get confirmation from the copyright office
4 before you understood that First-Racing purchased the
5 copyright from Vivendi?

6 A. Say that again?

7 Q. Are you claiming that you didn't know that
8 First-Racing purchased the copyright from Vivendi unless
9 you could confirm it at the copyright office?

10 A. As I recall at the time this e-mail was sent, I
11 don't think anybody knew that First-Racing or anybody
12 else other than Sierra, Papirus, Vivendi, whoever, owned
13 the copyrights.

14 Q. Okay. But you say here that "the copyright you
15 purchased." That's you talking to Steve Myers, right?

16 A. Yes.

17 Q. Okay.

18 A. What did you say I just said?

19 Q. Yeah, you in this e-mail said to Steve Myers, "the
20 copyright you purchased enables you to modify the
21 physics which then protects your version," right?

22 A. I'm not sure where that is.

23 Q. If you look at the paragraph that begins, "You
24 bought the rights to the code and objects, not the
25 entire product" -- it's one, two, three --

1 A. I see it now.

2 Q. And then keep going -- "The copyright you purchased
3 enables you to modify the physics, which then protects
4 your version of your own executable."

5 A. That was based on a phone call that I had with him
6 previous to this e-mail where he said to me on the phone
7 that they had purchased the copyright.

8 Q. Okay.

9 A. I still at that point didn't have any proof other
10 than what he said that they, in fact, did own the
11 copyright, because he was representing First-Racing. To
12 the best of my knowledge, at that point, aside from
13 things that had gone on in the sim racing community, the
14 assumption on my part was that Sierra, whoever, still
15 actually owned them. I mean, anybody could say -- I
16 could tell you I owned them.

17 Q. Well, let's in --

18 A. But, in fact, I didn't.

19 Q. Let's assume for a moment iRacing didn't own them.
20 Would that make it anymore legal what you did under
21 copyright law?

22 A. I don't know. All I know is that in 2004 when the
23 game -- you know, sometime in April of 2004, the product
24 had pretty much been abandoned. And in fact, Project
25 Wildfire came online at some point and basically

1 reiterated the fact that the game had been abandoned by
2 Sierra, they weren't going to produce anything, Papyrus
3 wasn't doing anything, and that it could be inferred
4 from the mission statement on Project Wildfire's
5 website, in fact, that they were going to distribute
6 tools so that people could enhance and modify the game
7 and continue down the road of keeping NASCAR 2003 alive,
8 which is when I undertook the whole effort of coming up
9 with something related to open-wheel racing.

10 Q. Sir, in your affidavit you say that in September
11 2003 product -- this is paragraph 10 --

12 A. I'm not sure I have that here.

13 Q. Here.

14 MR. SCHWARTZ: I can hand the witness another
15 copy of his affidavit with the Court's permission.

16 A. What am I looking at?

17 Q. Paragraph 10, page 4.

18 A. Okay.

19 Q. You say, "Project Wildfire released the CTS mod that
20 used modified physics." What's your basis for saying
21 that?

22 A. Statements on Project Wildfire's website. They, in
23 fact, admitted to having modified physics for the
24 Craftsman Truck Series.

25 Q. Modified from what, sir?

1 A. Modified from the original game.

2 Q. Well, you heard Mr. Myers testify that there were
3 additional physics models downloaded to NASCAR 2003
4 through a patch. Do you remember that?

5 A. Mm-hmm, and that's --

6 Q. Is that the modified physics you're talking about?

7 A. Yes.

8 Q. So that was what Sierra itself released to the game
9 through a patch, right?

10 A. Sierra did not release the CTS model.

11 Q. Didn't that come down through a patch distributed --

12 A. No.

13 Q. Okay. Well, let me take that back.

14 The physics models that the CTS mod was based on
15 were a part of the patch that Sierra released to NASCAR
16 2003, right?

17 A. I don't believe that's true.

18 Q. Do you know one way or another?

19 A. Based on my knowledge, Sierra released a patch, as I
20 recall, in September of 2003 that fixed various bugs
21 associated with the game that we had been playing from
22 February, whenever it was, to that point. And that
23 patch fixed those bugs and also, apparently, gave the
24 ability to unlock other physics that were now part of
25 the game.

1 Q. When you say "apparently," you heard Mr. Myers
2 testify earlier today how that patch was distributed,
3 didn't you?

4 A. Yes.

5 Q. And you heard him testify that there were additional
6 physics models included in that patch?

7 A. Yes.

8 Q. Isn't that what is in the -- I don't know if you
9 read the blog that your attorney submitted to the Court
10 today, but isn't that what the blog says?

11 A. Isn't -- say it again? Sorry.

12 Q. That Mr. Myers said in his blog, as was confirmed
13 today in his testimony, that he caused additional
14 physics models to be released into the NASCAR 2003
15 product through the patch download?

16 A. Yeah, I think he said that. But I think what he
17 meant -- or at least my interpretation of what he meant
18 is that, yeah, there was a patch and it had the ability
19 to have additional physics. That release of the patch
20 didn't enable the CTS mod physics, it didn't enable the
21 Trans Am mod physics just by downloading that patch.

22 Q. Do you know that or just surmise?

23 A. I know that for a fact. Because just -- in fact,
24 you even, during my deposition, proved that, because
25 your game would not operate until you downloaded the

1 patch, because you had to get an update on your
2 computer. That same patch is what he's talking about.
3 It had the capability of the additional physics, but
4 just downloading that patch did not give you the CTS
5 mod, the Busch Grand National mod, and whatever -- the
6 TA -- so-called PTA mod.

7 Q. Sir, my question is: Is it your testimony that, in
8 fact, Project Wildfire modified the executables that
9 were provided to it and all other NASCAR 2003 licensees
10 through that patch?

11 A. Say that again? Because I think you're confusing
12 the issue.

13 Q. I don't think I am confusing the issue, sir.

14 A. Repeat the question for me.

15 Q. The question is: Is it your testimony that Project
16 Wildfire modified the executables, modified the physics
17 engines that were installed in NASCAR 2003 by means of
18 the patch that Mr. Myers previously testified to?

19 MR. RYAN: Objection.

20 THE COURT: Overruled. Go on.

21 A. Do I think that Project Wildfire modified the
22 physics?

23 Q. Yes, that was provided to the NASCAR 2003 licensees
24 through the patch that Mr. Myers already testified to?

25 MR. RYAN: Objection.

1 THE COURT: Overruled.

2 A. Yes, I think that was my assumption at the time.

3 Q. It was your assumption. Okay.

4 Do you have anything to demonstrate that Project
5 Wildfire modified those executables other than your
6 assumption?

7 A. Their own words on their website.

8 Q. You want to show us these words, sir?

9 Let me direct your attention to the exhibit that
10 you submitted for this proposition, Exhibit 2 --

11 THE COURT: Is it 2 to his deposition?

12 MR. SCHWARTZ: It's Exhibit 2 to his transcript.

13 THE COURT: To the deposition transcript.

14 To the affidavit.

15 MR. SCHWARTZ: To the affidavit. I apologize,
16 your Honor.

17 BY MR. SCHWARTZ:

18 Q. Do you have Exhibit 2?

19 MR. SCHWARTZ: I don't know if he does, your
20 Honor. I just gave him --

21 A. You just handed me --

22 Q. I handed you the transcript.

23 This is Exhibit 2, at least as received from
24 your counsel.

25 THE COURT: It's the website, it says, "Project

1 Wildfire, the tradition continues"?

2 Mr. Schwartz, is that what you're showing him?

3 MR. SCHWARTZ: I gave him my copy, your Honor.

4 Mr. Ryan didn't provide a set of his exhibits.

5 Yes. "The tradition continues."

6 BY MR. SCHWARTZ:

7 Q. Where on it does it say here that Project Wildfire
8 modified an executable?

9 A. The second or third sentence of the mission
10 statement says, However, they provided the sim racing
11 community the ability to modify the simulation having
12 added three new physics engines. It says it right
13 there.

14 Q. It says they -- who's they in that sentence?

15 A. Papyrus.

16 Q. Papyrus. So isn't that consistent with what
17 Mr. Myers just testified, is that the physics engines
18 were downloaded through the patch to everybody who was a
19 NASCAR 2003 subscriber?

20 A. The capabilities of using those physics was
21 downloaded through the patch, yes. The CTS mod, which
22 is what you were referring to, I think, a few minutes
23 ago, was not part of that patch.

24 Q. I'm not talking about the mod, I'm talking about the
25 physics mod that supports the CTS mod.

1 A. It was my understanding, based on Project Wildfire's
2 own websites, that they modified the -- among other
3 things, the executable to support the CTS mod.
4 Specifically, I remember there having to be a distinct
5 pattern in which you had to download all these mods, the
6 GNS mod, the CTS mod. If you didn't do it in a certain
7 order, it would break other parts of the game. And, as
8 I recall, that was due to the way they modified the
9 physics for each of the mods. Because, if I'm not
10 mistaken, the GMS mod was released prior to the CTS mod
11 that you were referring to a minute ago --

12 Q. So is -- I'm sorry.

13 THE COURT: I'm not sure I understand.

14 What difference would it make if all of these
15 mods could only operate if you also had the patch that
16 had been released by Papyrus and if that patch was
17 subject to the EULA that everybody signed? What
18 difference does it make?

19 In other words, whatever modifications there
20 were could only be run if they were -- if someone also
21 had the patch; is that fair to say? The patch made it
22 possible --

23 THE WITNESS: Which modification?

24 THE COURT: The CTS mod, for example. Those
25 were mods that required this patch, correct?

1 THE WITNESS: That's right.

2 THE COURT: And the patch had been released by
3 Papyrus.

4 THE WITNESS: Papyrus, Sierra.

5 THE COURT: So the legal question -- this is for
6 me to decide -- is whether or not that was subject to
7 the initial EULA for anybody who had the NASCAR 2003
8 software.

9 Okay, go on.

10 MR. SCHWARTZ: Your Honor, I think I've
11 exhausted it with this witness. I personally don't
12 think it's relevant, although though your Honor has been
13 taking a lot of testimony on it. If your Honor desires,
14 I can recall Mr. Myers to clear up this question about
15 what was actually included in the patch, since
16 Mr. Robinson disagrees with what Mr. Myers testified.

17 THE COURT: And link this to why this is
18 relevant?

19 MR. SCHWARTZ: My problem is, I'm responding to
20 an argument in this case that says that because this
21 entity, Project Wildfire, released mods that we contend
22 were just graphic mods using existing physics engines,
23 and therefore, there was no modification of the
24 executables. They're arguing that somehow induced
25 Mr. Robinson to violate copyright law and somehow

1 justifies him doing what he did.

2 THE COURT: But you already have testimony that
3 the only thing that was released were modifications that
4 affected the graphics and nothing more. So you have
5 that testimony --

6 MR. SCHWARTZ: But Mr. Robinson just
7 contradicted that testimony now --

8 THE COURT: So the question is who I believe.

9 MR. SCHWARTZ: Yes.

10 THE COURT: Thank you, Mr. Robinson.

11 Anything further?

12 MR. SCHWARTZ: That's it, your Honor.

13 THE COURT: Thank you very much.

14 Anything further, Mr. Ryan?

15 MR. RYAN: No questions, your Honor.

16 (End of testimony of Mr. Robinson.)

17 * * * * *

18

19

20

21

22

23

24

25

1 - - - - -
2 CERTIFICATION
3

4 I certify that the foregoing is a correct
5 transcript of the record of proceedings in the
6 above-entitled matter to the best of my skill and
ability.

7
8
9
10 /s/Debra M. Joyce
11 Debra M. Joyce, RMR, CRR
Official Court Reporter

12 _____ Date
13
14
15
16
17
18
19
20
21
22
23
24
25

1		
2		<u>INDEX</u>
3		
4	<u>WITNESS</u>	<u>PAGE</u>
5	TIM McARTHUR	
6	Cross-Examination by Mr. Schwartz	3
7	TIM ROBINSON	
8	Cross-Examination by Mr. Schwartz	12
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25